Supreme Court, U.S.
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Nos. 91-1111 and 91-1128

IN THE

Supreme Court of the United States

October Term, 1992

HARTFORD FIRE INSURANCE CO., et al.,
Petitioners,

v.

STATE OF CALIFORNIA, et al.,
Respondents.

MERRETT UNDERWRITING AGENCY MANAGEMENT LIMITED, et al.,
Petitioners,

v.

STATE OF CALIFORNIA, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER STURGE REINSURANCE SYNDICATE MANAGEMENT LIMITED IN NO. 91-1128

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November 19, 1992

QUESTIONS PRESENTED

1. Does a United States court have subject matter jurisdiction over claims against a foreign defendant acting with its own nationals on its own soil engaged in business conduct regarded as lawful and necessary in its own country, where there is no conduct in or into the United States and the conduct is not intended to wrong any United States plaintiff?

2. Does international comity compel a United States court to abstain from exercising extraterritorial jurisdiction over claims against a foreign defendant acting with its own nationals on its own soil engaged in business conduct regarded as lawful and necessary in its own country, where there is no conduct in or into the United States and the conduct is not intended to wrong any United States plaintiff?

PARTIES TO THE PROCEEDING

This case involves complaints by nineteen states and numerous private plaintiffs that were consolidated for pretrial purposes by the Judicial Panel on Multi-District Litigation in MDL Docket No. 767.

Plaintiffs in the consolidated proceeding, who were also appellants in the Court of Appeals for the Ninth Circuit, were:

States: The States of Alabama, Alaska, Arizona, California, Colorado, Connecticut, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Montana, New Jersey, New York, Ohio, Pennsylvania, Washington, West Virginia, and Wisconsin.

State or Local Government Entities, Listed by State:

Alabama: City of Mobile; City of Birmingham

California: City of Lafayette; City and County of San Francisco; County of San Benito

Louisiana: City of Baton Rouge; City of New Orleans; City of Slidell; City of Nachitoches; City of Eunice

Massachusetts: Town of Hanover; Town of Milford

Montana: County of Teton

New York: Roosevelt Island Operating Authority, Inc., Village of Croton; Village of Lake Success

Ohio: Township of Jackson; County of Hardin

Pennsylvania: County of Schuylkill; City of Altoona; City of York; Borough of Chambersburg

Washington: County of Cowlitz

West Virginia: City of Clay; County of Hancock; County of Mineral; County of Wirt

Private Plaintiffs: Big D Building Supply Corp.; Anastasios Markos, T/A Municipal Exxon; Bay Harbor Park Homeowners Ass'n, Inc.; Environmental Aviation Sciences, Inc.; Carlisle Day Care Center, Inc.; Bensalem Township Authority; Keyboard Communications, Inc.; Glabman Paramount Furniture Mfg. Co., Inc.; Les-Ray Bobcat, Inc.; Jerry Grant Chemical Associates, Inc.; Durawood, Inc.; Carmella M. "Boots" Liberto Trading as R.J. Liberto, Inc.; Henry L. Rosenfeld; Acme Corrugated Box Co., Inc.; P&J Casting Corp.; Ace Check Cashing, Inc.

Defendants in the consolidated proceeding, who were also appellees in the Ninth Circuit, were the following:

Allstate Insurance Company; Aetna Casualty & Surety Company; CIGNA Corporation; General Reinsurance Corporation; Hartford Fire Insurance Company; Insurance Company of North America; Insurance Services Office, Inc.; Reinsurance Association of America; Merrett Underwriting Agency Management Limited; Three Quays Underwriting Management Limited; Janson Green Management Limited; Murray Lawrence & Partners; D.P. Mann Underwriting Agency Limited; Robin A.G. Jackson; Peter N. Miller; Edwards & Payne (Underwriting Agencies) Limited; Sturge Reinsurance Syndicate Management Limited; Thomas A. Greene & Company, Inc.; Ballantyne, McKean & Sullivan Limited; C.J.W. (Underwriting Agencies) Limited (sued herein as C.J. Warrilow-Hine & Butcher, Ltd.); Lambert Brothers (Underwriting Agencies) Limited (sued herein as J. Brian Hose & Others, Ltd.); R.K. Carvill & Co., Ltd.; Continental Reinsurance Corporation (U.K.) Limited; Unionamerica Insurance Company, Ltd.; CNA Re (U.K.), Ltd.; Kemper Reinsurance London, Ltd.; Constitution Reinsurance Corporation; Mercantile & General Reinsurance Company of America; Prudential Reinsurance Company; North America Reinsurance Company; Winterthur Swiss Insurance Company; Excess Insurance Company, Ltd.; Excess Insurance Group, Ltd.; Terra Nova Insurance Company Limited.

STATEMENT PURSUANT TO RULE 29.1

Sturge Reinsurance Syndicate Management Limited, successor in interest to Oxford Syndicate Management Ltd. (sued herein as K.F. Alder & Others (U.A.) Ltd.), is wholly owned by Sturge Group PLC.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER STURGE REINSURANCE SYNDICATE MANAGEMENT LIMITED IN NO. 91-1128

Petitioner Sturge Reinsurance Syndicate Management Limited, successor in interest to Oxford Syndicate Management Ltd. (sued herein as K.F. Alder & Others (U.A.) Ltd.), respectfully submits this brief on the merits.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 938 F.2d 919 (9th Cir. 1991). A-1-31.[1] The opinion of the District Court for the Northern District of California is reported at 723 F. Supp. 464 (N.D. Cal. 1989). A-32-83.

JURISDICTION

The opinion of the Court of Appeals was entered on June 18, 1991. Petitioner filed a timely petition for rehearing and suggestion for rehearing *en banc*, which the Court of Appeals denied on October 15, 1991. The Petition for Writ of Certiorari to the Court of Appeals for the Ninth Circuit was filed on January 13, 1992. This Court granted certiorari in No. 91-1128 on October 5, 1992. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This petition involves Sections 1 and 6a of the Sherman Act, 15 U.S.C. §§ 1 and 6a, respectively. Section 1 of the Sherman Act was enacted July 2, 1890. Section 6a of the Sherman Act was enacted October 8, 1982, as part of the Foreign Trade Antitrust Improvements Act. The full texts of these provisions are reproduced in the Petition Appendix at A-93.

STATEMENT OF THE CASE

This is a massive antitrust case in which American plaintiffs have extended a global dragnet, trying to sweep within the

1. Numbers following the letter "A" denote reference to the Appendix to the Petition for Certiorari in No. 91-1128 (the "Petition Appendix").

jurisdiction of United States courts and United States regulatory law, a foreign defendant, K.F. Alder, engaged in necessary and normal acts required to conduct business in the British reinsurance market.

A. Nature Of The Case

These consolidated actions were filed by nineteen states and numerous private plaintiffs, all of whom sue as consumers of commercial general liability ("CGL") insurance.[2] In addition, the states sue as *parens patriae*. JA-6[3] (Cal. Compl.); JA-58 (Conn. Compl.). The complaints name as defendants a number of primary insurers who are major providers of CGL insurance in the United States. The remaining defendants are entities and individuals consisting of both domestic and foreign reinsurance companies, underwriters at Lloyd's of London ("Lloyd's") who wrote reinsurance and retrocessional coverage, Lloyd's brokers and United States trade organizations of insurers and reinsurers. Plaintiffs allege violations of federal antitrust law and state laws based on alleged

2. The state complaints fall into two groups depending on when they were filed. The first round of complaints were filed by Alabama, Arizona, California, Massachusetts, New York, West Virginia, and Wisconsin. Citations to these complaints are to the California Complaint ("Cal. Compl."). The second round of complaints were filed by Alaska, Colorado, Connecticut, Louisiana, Maryland, Michigan, Minnesota, Montana, New Jersey, Ohio, Pennsylvania, and Washington. Citations to these complaints are to the Connecticut Complaint ("Conn. Compl."). The private complaints track the state complaints. A-37-38. Subsequent to the proceedings before the Ninth Circuit, a complaint was filed by Florida. The Florida complaint is substantially similar to the other states' complaints.

3. Numbers following the letters "JA" denote reference to the Joint Appendix.

conspiracies to restrict the availability of CGL insurance and reinsurance[4] in the United States.

Petitioner Sturge Reinsurance Syndicate Management Limited, successor in interest to Oxford Syndicate Management Ltd. (sued herein as K.F. Alder & Others (U.A.) Ltd.) ("K.F. Alder"), is a foreign company with its principal place of business in London, England. *See* JA-11, 13 (Cal. Compl. ¶¶ 4(t), 12); JA-61, 68 (Conn. Compl. ¶¶ 4(h), 25). K.F. Alder manages syndicates of underwriters who provide reinsurance in the Lloyd's of London marketplace.

The heart of plaintiffs' claims, as consumers of primary insurance, is the manner in which primary insurance in the United States is being written. Plaintiffs then reach beyond the primary insurance marketplace and allege that agreements in the reinsurance and, even more remotely, the retrocessional reinsurance[5] markets affected the availability of primary insurance in the United States. This brief addresses the two "London reinsurance claims" brought against K.F. Alder and other British defendants.[6] *See* JA-45-46

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4. Reinsurance is insurance for insurers. JA-10 (Cal. Compl. ¶ 4(o)); JA-63 (Conn. Compl. ¶ 4(p)).

5. Retrocessional reinsurance means reinsurance of the business of reinsurers. JA-63 (Conn. Compl. ¶ 4(r)).

6. The other British defendants named in these claims consist of individual underwriters at Lloyd's, other agencies which manage syndicates of underwriters, London insurance companies ("London Market Companies") and London reinsurance brokers. The other British defendants in these claims are: Merrett Underwriting Agency Management Limited, Murray Lawrence & Partners, D.P. Mann Underwriting Agency Limited, Robin A.G. Jackson, Edwards & Payne (Underwriting Agencies) Limited, C.J.W. (Underwriting Agencies) Limited, Unionamerica Insurance Co., Ltd., Terra Nova Insurance Co., Ltd., CNA Re (U.K.), Ltd., Ballantyne, McKean & Sullivan, Ltd., Excess (continued...)

(Cal. Compl. ¶¶ 136-40); JA-94-97 (Conn. Compl. ¶¶ 130-39).[7] These claims charge that alleged agreements among K.F. Alder and other foreign reinsurers defining the coverage terms for reinsurance and retrocessional reinsurance that they jointly underwrote in the Lloyd's market violate United States antitrust law.

K.F. Alder and the other British defendants moved to dismiss the London reinsurance claims in the District Court on the grounds of international comity, lack of subject matter jurisdiction, antitrust immunity under the McCarran Ferguson Act, 15 U.S.C. §§ 1011-1015, and lack of standing. A-40-41. The other British defendants also moved to dismiss certain other claims that do not name K.F. Alder on the same grounds. A-65-66. After both sides were given an ample opportunity to develop and marshall the facts,[8] the District Court dismissed all of these claims, including the London reinsurance claims, on the grounds of international comity. A-77-78. The Court of Appeals reversed and remanded these claims. A-31. This Court granted certiorari on October 5, 1992.

B. Factual Background

The following statement of the pertinent facts is drawn from the allegations of the complaints as characterized by the Court of

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6.(...continued)
Insurance Group, Ltd. and Kemper Reinsurance London, Ltd. A-39-40. Unlike many of these defendants, K.F. Alder is not named in the claims alleging direct manipulation of the primary insurance marketplace.

7. K.F. Alder is named in all of the second round complaints except Alaska's. A-40 n.10.

8. The filing of the complaints followed two year investigations conducted by the regulatory agencies of several states. Significantly, the District Court gave the parties a full opportunity to conduct any discovery necessary to bring or respond to the motions. A-34, 78.

Appeals and the District Court. The District Court found that there were no factual disputes material to its ruling, A-79, and the Court of Appeals adopted the District Court's statement of the facts. A-9.

1. Primary Insurance

CGL insurance protects the insured against the risk of liability to third parties for bodily injury or property damage. JA-8 (Cal. Compl. ¶ 4(a)); JA-60 (Conn. Compl. ¶ 4(b)). It is purchased by businesses, non-profit entities and governmental units. JA-8 (Cal. Compl. ¶ 4(a)); JA-60 (Conn. Compl. ¶ 4(b)). CGL insurance is written predominately, but not exclusively, on standard policy forms written by the Insurance Services Office ("ISO"). JA-9, 19 (Cal. Compl. ¶¶ 4(k), 38, 41); JA-60, 73-74 (Conn. Compl. ¶¶ 4(e), 47, 50). ISO is an association of more than one thousand property and casualty insurers, including the primary insurers named in this suit. JA-9, 19 (Cal. Compl. ¶¶ 4(k), 38); JA-60 (Conn. Compl. ¶ 4(e)). ISO gathers statistical data to support rate-making and promulgates and seeks state approval of forms used in underwriting CGL insurance. JA-19-20 (Cal. Compl. ¶¶ 38-45); JA-73-74 (Conn. Compl. ¶¶ 47-54). Plaintiffs allege that certain defendants, *but not K.F. Alder*, conspired to eliminate or limit certain types of coverages provided on the ISO forms for CGL insurance, including, pollution,[9] occurrence[10] and long-tail coverage.

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9. Prior to 1986, the ISO CGL policy excluded all coverage for pollution claims, except where the discharge of pollutants was "sudden and accidental." The 1986 ISO CGL form contained an absolute pollution exclusion barring coverage for all pollution damage. JA-9-23 (Cal. Compl. ¶¶ 4(g), 60); JA-62, 76 (Conn. Compl. ¶¶ 4(n), 64).

10. Under an "occurrence-based" policy, an insured is covered for claims arising out of occurrences (*i.e.* fortuitous damage) during the policy period, no matter when the claims are presented. JA-8 (Cal. Compl. ¶ 4(b)); JA-62 (Conn. Compl. ¶ 4(m)). "Occurrence-based" policies (continued...)

2. Reinsurance And Retrocessional Reinsurance

Primary insurers limit their financial exposure by purchasing reinsurance. JA-10, 17 (Cal. Compl. ¶¶ 4(o), (p), 27); JA-63-64 (Conn. Compl. ¶ 4(p), (w)). There are several markets for reinsurance, including the United States, London and the European continent. JA-17 (Cal. Compl. ¶ 30). In turn, reinsurers look to retrocessional reinsurers to share their risk. JA-63 (Conn. Compl. ¶ 4(r)).

a. The London Reinsurance Marketplace

The London reinsurance market centers around the market at Lloyd's. *See Travelers Indem. Co. v. Booker*, 657 F. Supp. 280, 282 (D.D.C. 1987); *Edinburgh Assurance Co. v. R.L. Burns Corp.*, 479 F. Supp. 138, 144, (C.D. Cal. 1979), *aff'd in part and rev'd in part on other grounds*, 669 F.2d 1259 (9th Cir. 1982). Lloyd's is not a company and does not underwrite insurance. Rather, it is an insurance marketplace or exchange in London where syndicates of underwriters transact business. JA-11 (Cal. Compl. ¶ 4(t)); JA-61 (Conn. Compl. ¶ 4(h)). *See Booker*, 657 F. Supp. at 282; *Edinburgh Assurance Co.*, 489 F. Supp. at 144. In the Lloyd's marketplace, risks are assumed by individual investors or underwriters. Underwriters are organized into syndicates which are managed by agencies such as K.F. Alder.

The purchase and sale of insurance occurs on the floor of the underwriting room at Lloyd's, or in the offices of independent

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10 (...continued)
expose insurers to "long-tail risks" that may give rise to claims long after the policy period. JA-9 (Cal. Compl. ¶ 4(h)); JA-64 (Conn. Compl. ¶ 4(v)). On the other hand, under a "claims-made" policy coverage is limited to claims made during the policy period regardless of when the damage out of which the claim arose took place. JA-8 (Cal. Compl. ¶ 4(c)); JA-60 (Conn. Compl. ¶ 4(a)).

insurance companies in London (*i.e.* London Market Companies). *See Booker*, 657 F. Supp. at 282; *Edinburgh Assurance Co.*, 479 F. Supp. at 144. Syndicates of underwriters authorize a single underwriter to accept risks on their behalf and bind them to coverage terms.

Coverage can be placed at Lloyd's only through a Lloyd's broker. JA-17 (Cal. Compl. ¶ 32); JA-61 (Conn. Compl. ¶ 4(h)). The broker approaches underwriters representing various syndicates on the floor of Lloyd's in order to obtain subscriptions by underwriters for portions of the proposed risk. JA-11 (Cal. Compl. ¶ 4(u)); JA-61 (Conn. Compl. ¶4(g)). Each underwriter makes the individual decision whether to underwrite a portion of the risk. *See Booker*, 657 F. Supp. at 283; *Edinburgh Assurance Co.*, 479 F. Supp. at 145. "A Lloyd's policy may be underwritten by dozens of individual syndicates, each sharing a portion of the risk." JA-61 (Conn. Compl. ¶ 4(h)).

The form of reinsurance at issue in the London reinsurance claims is "treaty" reinsurance, JA-17 (Cal. Compl. ¶ 27), in which reinsurance companies agree to indemnify the party seeking reinsurance (the "cedent") for a defined portion of the risks to be assumed by the cedent in a given "book of business" during the treaty period. JA-10, 17 (Cal. Compl. ¶¶ 4(p), 27); JA-64 (Conn. Compl. ¶ 4(w)). *See generally Unigard Sec. Ins. Co. v. North River Ins. Co.*, 762 F. Supp. 566, 572 n.2 (S.D.N.Y. 1991), *appeal pending*, No. 91-7534 (2d Cir. filed May 24, 1991). Treaty reinsurers do not deal directly with the consumers of primary insurance. A-68.

By its nature, treaty reinsurance involves the underwriting of extremely large risks. The spreading of these large risks in the London reinsurance market necessarily requires numerous subscribers to each treaty. JA-11, 17 (Cal. Compl. ¶¶ 4(u), 28, 31); JA-61 (Conn. Compl. ¶ 4(g)). As a result, treaty reinsurance requires negotiations over the terms and conditions on which risks

will be accepted and insured among the numerous subscribers. A-68; JA-11, 17 (Cal. Compl. ¶¶ 4(u), 28, 31); JA-61 (Conn. Compl. ¶ 4(g)). This treaty reinsurance product could not be offered without agreement among the numerous reinsurers as to the terms and conditions on which they will jointly underwrite risks.

b. Regulation Of The London Reinsurance Marketplace

The London reinsurance marketplace is subject to the regulatory and competitive framework established by the British government. In 1871, by a statute known as the "Lloyd's Act," Parliament established the Society of Lloyd's and empowered it to regulate the marketplace composed of its members. In the unique self-regulatory mechanism within Lloyd's, the Lloyd's governing body continues to be empowered to exercise quasi-governmental authority in regulating the activity of its members. Lloyd's Acts, 1871-1982.[11]

Taking account of the fact that reinsurance in the Lloyd's marketplace can be made available only by allowing numerous reinsurers to agree to the terms and conditions on which they will jointly underwrite risks, British restrictive practices regulation expressly permits agreements among British insurers, reinsurers, and retrocessionaires relating to the provision of insurance services. *See* A-73; JA-263 (Restrictive Trade Practices (Services) Order 1976, S.I. 1976 No. 98, Schedule ¶ 8); § 2 Competition Act of 1980, vol. 47 Trade & Industry (PT 1). Indeed, as the District Court found, the alleged agreements among the British defendants, including K.F. Alder, were "openly conducted in conformity with English law" and were "directed primarily at reducing [the British defendants']

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11. The Lloyd's Act of 1982, which incorporates those sections of the Lloyd's Acts of 1871-1982 that are currently in force, has been lodged with the Clerk of the Court.

exposure to certain risks and controlling losses, a legitimate business purpose." A-73, 76.

C. The Complaints

The complaints allege a number of conspiracies and agreements which purportedly violate United States antitrust law. The vast majority of plaintiffs' federal antitrust claims do not name K.F. Alder as a defendant.

Plaintiffs are United States consumers of primary insurance from United States insurers and their claims principally concern the terms of this buyer-seller relationship. Plaintiffs reach out to bring members of the British industry before the Court by alleging that the availability of reinsurance, JA-18 (Cal. Compl. ¶ 34); JA-63 (Conn. Compl. ¶ 4(p)), and even more remotely the availability to reinsurers of retrocessional reinsurance, JA-48-49 (Cal. Compl. ¶¶ 149-50); JA-96-97 (Conn. Compl. ¶¶ 138-39), has an effect on the ability and willingness of United States insurers to provide primary insurance in the United States. The complaints admit, and the District Court recognized, that there are a number of markets other than the Lloyd's market for reinsurance. A-68; JA-17 (Cal. Compl. ¶ 30).

A review of the allegations in the complaints reveals that K.F. Alder, a British subject, is a peripheral defendant that engaged in alleged conduct exclusively in London, which was permitted within the framework of the British insurance regulatory system and was necessary conduct customarily taken among risk-sharers. As the complaints make clear, K.F. Alder was brought into the case solely as a participant in the Lloyd's reinsurance market and not because of any alleged relationship with plaintiffs (or with any other insurance consumer) or because of any conduct undertaken in the United States. The allegations against K.F. Alder—that it allegedly agreed with other British defendants concerning the terms of reinsurance in the Lloyd's reinsurance market—are only tangentially

related to the core complaint here, namely, the availability of CGL insurance in the United States.

1. The London Reinsurance Claims

K.F. Alder is named as a defendant only in the London reinsurance claims.[12] JA-45-46 (Cal. Compl. ¶¶ 136-40); JA-94-97 (Conn. Compl. ¶¶ 130-39). The London reinsurance claims are directed *solely* against London-based defendants and arise from alleged activity *entirely* within the London reinsurance and retrocessional reinsurance markets. There is no allegation of any activity in the United States by K.F. Alder. There is no allegation as to K.F. Alder of any agreement concerning the underwriting (or refusal to underwrite) insurance for consumers. The London reinsurance claims challenge the legality of alleged agreements among the British defendants, including K.F. Alder—joint venturers in worldwide reinsurance treaties—as to the coverage terms and conditions on which they were willing to underwrite risks.

Plaintiffs allege that the British defendants, including K.F. Alder, agreed that their North American casualty reinsurance treaties would exclude pollution coverage. JA-45 (Cal. Compl. ¶¶ 138-39); JA-94-95 (Conn. Compl. ¶¶ 132-33). No boycott, coercion or intimidation is alleged. A-39-40.

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12. K.F. Alder is named in only one other count of the various complaints. JA-88-90 (Conn. Compl. ¶¶ 115-19). In that claim, plaintiffs allege a "global conspiracy" among all 32 defendants. The District Court dismissed the global conspiracy claim on the ground that it "merely lumps together the separate conspiracies elsewhere alleged without any allegation indicating how the separate conspiracies became a single global conspiracy." A-64-65. As to K.F. Alder, the global conspiracy claim was based entirely on K.F. Alder's alleged participation in the London reinsurance claims. The dismissal was affirmed by the Court of Appeals with leave to amend. A-26-27. It is therefore not before this Court.

In the second round of complaints, plaintiffs allege that the British defendants, including K.F. Alder, agreed not to underwrite retrocessional coverages for risks that did not contain a pollution exclusion in the original property insurance coverage.[13] JA-96 (Conn. Compl. ¶¶ 137-38).

K.F. Alder is a British company, wholly owned by British nationals. There is no allegation in the complaints that K.F. Alder has any parent, subsidiaries or affiliates in the United States. K.F. Alder's principal place of business is in London, England. JA-11, 13 (Cal. Compl. ¶¶ 4(t), 12); JA-61, 68 (Conn. Compl. ¶¶ 4(h), 25). With respect to the claims at issue in this case, K.F. Alder operates solely in the Lloyd's reinsurance market. K.F. Alder provides reinsurance on a global basis, in London, for London reinsurers that reinsure United States based and other risks. In fact, there is no allegation in the complaints that K.F. Alder provides CGL insurance in the United States. Moreover, there is not a single allegation that K.F. Alder performed any act in the United States in furtherance of any alleged conspiracy. The sole specific conduct allegation against K.F. Alder is that it attended a single meeting in London along with certain of the British defendants at which they allegedly agreed to the terms on which they would jointly underwrite reinsurance coverages. JA-32 (Cal. Compl. ¶¶ 94-95); JA-84-85 (Conn. Compl. ¶¶ 98-99). As the District Court found, there were legitimate business reasons for the British defendants, including K.F. Alder, to join together and agree to the terms on which they would underwrite risks. A-76-77.

13. This claim in the Connecticut Complaint is similar to a claim in the California Complaint. JA-47-49 (Cal. Compl. ¶¶ 146-50). However, K.F. Alder is not named as a defendant in this claim of the California Complaint or the other first round complaints.

2. The Federal Antitrust Claims That Do Not Involve K.F. Alder

Plaintiffs allege a conspiracy among certain defendants *(but not K.F. Alder)* to limit the availability of certain coverages—namely, pollution and long-tail coverages—under CGL insurance policies written in the United States for United States risks. Plaintiffs allege a conspiracy among the four primary insurer defendants and others *(but not K.F. Alder)* to manipulate the form development process of ISO for CGL policy forms to limit the available coverage. JA-36-42 (Cal. Compl. ¶¶ 112-130); JA-90-92 (Conn. Compl. ¶¶ 120-24). Plaintiffs allege that certain primary insurers pressured ISO to change its proposed form for CGL insurance for pollution losses. JA-24 (Cal. Compl. ¶¶ 61-62); JA-76-77 (Conn. Compl. ¶¶ 65-66). Plaintiffs allege that after this attempt failed, certain primary insurers allegedly met or communicated with, and encouraged, certain reinsurer defendants *(but not K.F. Alder)* to coerce ISO to adopt the primary insurers' demands and to boycott the broader CGL forms. JA-24-26 (Cal. Compl. ¶¶ 61-62, 64, 69-70); JA-77-79 (Conn. Compl. ¶¶ 65-66, 68, 73-74).

Secondarily, plaintiffs allege that the availability of reinsurance has an effect on the ability and willingness of United States insurers to provide primary insurance in the United States. JA-18 (Cal. Compl. ¶ 34); JA-63 (Conn. Compl. ¶ 4(p)). Plaintiffs allege that certain reinsurers, brokers and reinsurance trade organizations *(but not K.F. Alder)* engaged in a conspiracy to restrict the terms under which reinsurance coverage would be provided for CGL risks and to refuse to reinsure CGL risks on occurrence forms by, among other things, coercion and intimidation of primary insurers. JA-43-44 (Cal. Compl. ¶¶ 131-35); JA-92-94 (Conn. Compl. ¶¶ 125-29).

Tertiarily, the plaintiffs allege a conspiracy to restrict the terms and conditions under which insurance coverages would be available

to purchasers of commercial umbrella and excess insurance.[14] Plaintiffs allege that three of the primary insurers, ISO and certain reinsurers *(but not K.F. Alder)* agreed to, and promulgated, model forms for umbrella and excess insurance. JA-46-47 (Cal. Compl. ¶¶ 141-45); JA-97-98 (Conn. Compl. ¶¶ 140-44).

Allegedly in furtherance of these conspiracies, plaintiffs cite numerous acts by the defendants *(but not K.F. Alder)* in the United States. For example, plaintiffs allege that certain London reinsurers *(but not K.F. Alder)* "threatened a boycott of North American CGL risks" unless the ISO met their demands to change the ISO CGL insurance forms. JA-26 (Cal. Compl. ¶ 74); JA-79 (Conn. Compl. ¶ 78). Plaintiffs also allege that certain London reinsurers attended an ISO Executive Committee meeting and presented their "agreed upon positions that there would be changes in the CGL forms or no reinsurance." JA-27-29 (Cal. Compl. ¶¶ 78-82); JA-80-81 (¶¶ 82-86). There is no allegation that K.F. Alder attended that meeting. Plaintiffs allege that representatives of certain London reinsurers made various public announcements to "present their agreed upon position that Lloyd's of London was withdrawing entirely from the business of reinsuring primary U.S. insurers who wrote on the occurrence form." JA-31 (Cal. Compl. ¶ 89); JA-83 (Conn. Compl. ¶ 93). There is no allegation that K.F. Alder made any such pronouncements.

3. The Relief Requested By Plaintiffs

The complaints seek a radical restructuring of the British reinsurance industry as well as compensatory damages. Plaintiffs ask the District Court to prohibit each and every defendant insurer and

14. Excess insurance is a higher level of indemnity protection that sits on top of either a self-insurance program or a primary insurance policy. Umbrella coverage is a specialized form of excess insurance. JA-33 (Cal. Compl. ¶ 101); JA-86 (Conn. Compl. ¶ 105).

reinsurer, including K.F. Alder, from making any public announcements regarding product restrictions, pricing behavior or loss reserve changes. JA-52 (Cal. Compl. ¶ 167). Plaintiffs request that all defendant reinsurers, including K.F. Alder, be enjoined from communicating, outside of a formal meeting of a trade organization, concerning rates, pricing, forms or other terms of insurance or reinsurance. JA-53 (Cal. Compl. ¶ 172). Plaintiffs further request that the District Court order each defendant underwriter at Lloyd's, including K.F. Alder, and each London Market Company to withdraw certain terms and conditions of coverage they have established in London in the exercise of their business judgment. JA-54 (Cal. Compl. ¶ 174). Plaintiffs also request the District Court to monitor the compliance of all defendants, including K.F. Alder, with the United States antitrust laws for the next ten years. JA-55 (Cal. Compl. ¶ 181).

D. The District Court's Decision

K.F. Alder, together with the other British defendants named in the London reinsurance claims, moved in the District Court for the Northern District of California to dismiss the London reinsurance claims for, *inter alia*, lack of subject matter jurisdiction and on the grounds of international comity. Accepting plaintiffs' factual allegations as true, A-79, the District Court dismissed these claims.[15] The District Court (Schwarzer, J.) held that there was subject matter jurisdiction under the antitrust laws based on plaintiffs' allegations that the conduct of the British defendants had a direct effect on United States commerce. A-69-71. The District Court declined, however, to exercise that jurisdiction under

15. In addition, the District Court dismissed the pendent state law claims against the British defendants, including K.F. Alder, to the extent they were based on the conduct alleged in the London reinsurance claims. A-78.

principles of international law and comity applying the analysis set forth in *Timberlane Lumber Co. v. Bank of America*.[16]

The District Court found a significant conflict between plaintiffs' suits and British law and policy. After assessing this and each of the other factors set forth in *Timberlane*, the District Court concluded that the "conflict with English law and policy which would result from the extra-territorial application of the antitrust laws in this case is not outweighed by other factors." A-77-78.

E. The Ninth Circuit's Decision

The Court of Appeals for the Ninth Circuit reversed the District Court's dismissal of the London reinsurance claims. The Court of Appeals agreed with the District Court that there was a business or economic justification for the alleged activity by the foreign reinsurer defendants. A-31. In addition, the Court of Appeals agreed with the District Court that the exercise of jurisdiction would result in "conflict with a long-established British policy towards a venerable British trade, the underwriting of insurance." A-31. Nevertheless, the Court of Appeals ruled that the dismissal on grounds of comity was improper as to all defendants and reversed that dismissal.

As an initial matter, the Court of Appeals held that the Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a (the "FTAIA") had limited the normal comity analysis required by *Timberlane*, A-28, and thus, by necessary implication *expanded* the reach of the Sherman Act. The Court of Appeals stated that if a "complaint survives the new bar of [the FTAIA (which limits foreign plaintiffs' suits)] . . . it is only in an unusual case that comity will require abstention from the exercise of jurisdiction." *Id.*

16. 549 F.2d 597 (9th Cir. 1976), *aff'd after remand*, 749 F.2d 1378 (9th Cir. 1984), *cert. denied*, 472 U.S. 1032 (1985).

The Court of Appeals then reweighed the *Timberlane* factors and held that the "significant conflict with English law and policy" was outweighed by other *Timberlane* factors. A-29-31.

In conducting its analysis, the Court of Appeals did not consider the very different situations of the different British defendants, despite important factual differences among them. This oversight was greatly to the detriment of K.F. Alder, for the factors weigh decidedly in K.F. Alder's favor.[17]

17. The British defendants include individual Lloyd's underwriters, independent syndicates of underwriters at Lloyd's and London Market Companies as well as London brokers. Each individual, each syndicate at Lloyd's and each of the London Market Companies is a separate and independent entity. First, "Lloyd's" is not an insurance company but rather an "insurance marketplace or exchange in London, England, where syndicates transact their business." JA-11, 17 (Cal. Compl. ¶¶ 4(t), 31); JA-61 (Conn. Compl. ¶ 4(h)); *see also Booker*, 657 F. Supp. at 282; *Edinburgh Assurance Co.*, 489 F. Supp. at 144. The plaintiffs allege that these syndicates, including K.F. Alder, are "separately capitalized, independently operated, competing firms." JA-17 (Cal. Compl. ¶ 31); JA-64 (Conn. Compl. ¶ 4(u)). Furthermore, the London Market Companies are insurance companies located in London that are *not* a part of the Lloyd's marketplace. JA-11 (Cal. Compl. ¶ 4(v)); JA-62 (Conn. Compl. ¶ 4(i)). Finally, although the Court of Appeals only found that the London Market Companies (but not the independent syndicates of underwriters at Lloyd's) were subsidiaries of American corporations, A-10, it nevertheless used this fact to retain jurisdiction over K.F. Alder and other Lloyd's defendants. A-29-30. Here too, the Court of Appeals failed to recognize that K.F. Alder, unlike some of the other British defendants, is not (with the exception of a rifle-shot "global conspiracy" claim that the Court of Appeals ruled was properly dismissed) alleged to have conspired with American insurers.

On January 13, 1992, K.F. Alder and the other British defendants filed a Petition for a Writ of Certiorari to the Court of Appeals for the Ninth Circuit. This Court granted certiorari on October 5, 1992.

SUMMARY OF ARGUMENT

In this global economy, increasingly transactions have effects beyond their borders. Application of every nations' law to the same transaction would create enormous inefficiencies in markets and unfairness to innocent traders who have no notice that their natural, normal and customary acts may later be considered a "wrong" on the other side of the world. To protect against such inefficiencies, unfairness and intrusion, and to legitimize extraterritorial applications of United States law where the failure to do so would leave United States competition exposed to flagrant economic wrongdoing, a limiting principle is necessary.

The case of K.F. Alder provides the opportunity for declaration of such a limiting principle: United States law does not extend to a foreign actor who acts on its home soil, with its own nationals, in pursuance of conduct regarded as a lawful, good and necessary business activity in its own country, where there is no conduct in or into the regulating nation, and which conduct has no characteristics of a wrong to the ultimate plaintiff.

Second, if subject matter jurisdiction is present under such circumstances, comity considerations require dismissal of the London reinsurance claims against K.F. Alder. Comity is a principle of reciprocity and mutual respect. Just as the United States policy and its citizens surely would wish no other nation's courts to intermeddle in the way it conducts its internal markets, the United States should reciprocally leave the Lloyd's reinsurance market to the governance of Great Britain. K.F. Alder's conduct is at the core of operations necessary to the functioning of the Lloyd's reinsurance market. Therefore comity requires dismissal of K.F. Alder.

Many other factors underscore the correctness of this result. K.F. Alder is British. It has no American corporate affiliation. K.F. Alder conducted its business solely in the Lloyd's market and not in the United States. It had no notice of a wrong to Americans.

The District Court dismissed the foreign defendants on grounds of comity largely because application of United States law in this case would conflict with the operation of the Lloyd's reinsurance market and no other factor counseled the opposite result. District courts should be encouraged to exercise just such restraint in the interests of containing meritless litigation and putting a limit on the sometimes litigious tendencies in our economy. Because the District Court evaluated each factor required to be considered by law, its determination should be respected and its exercise of restraint should be affirmed.

ARGUMENT

I.

THERE IS NO JURISDICTION OVER THE CLAIMS AGAINST K.F. ALDER

This case presents the problem of the extraterritorial application of United States antitrust law. The case of K.F. Alder represents the extreme application of federal jurisdiction. Plaintiffs seek to draw into United States courts a remote foreign defendant on the outer reaches of alleged conspiracies. No proper interest is served by forcing K.F. Alder into the machinery of American law.

The extraterritoriality debate reflects the tension between the extremes of limited jurisdiction and far-reaching extended jurisdiction. The problem of limited jurisdiction (jurisdiction cut back to American shores) is that a nation may be powerless to defend itself against economic aggressors of another nation who may wish to sharp shoot across national borders and can do so with

impunity. This problem gave rise to the *Lotus* doctrine: a nation's jurisdiction extends to such sharp-shooting acts with effects in the regulating nation's borders. *The S.S. Lotus*, 2 World Court Rep. 20 (1935). The *Lotus* doctrine has expanded into well known American law that has properly allowed United States law to reprehend worldwide strategic cartels targeted at the United States. *See, e.g., In re Uranium Antitrust Litigation*, 617 F.2d 1248 (7th Cir. 1980) (affirming default judgment against foreign participants in Uranium cartel); *United States v., National Lead Co.*, 63 F. Supp. 513 (S.D.N.Y. 1945), *modified and aff'd*, 332 U.S. 319 (1948) (enjoining international titanium cartel from exchanging and cross-licensing patents). The United States must be able to exonerate its important national interests even in a global interdependent economy.

The converse problem is that of extended jurisdiction. In a world of unlimited extraterritorial jurisdiction, nations might expansively intercede in the affairs of other nations. There are three concerns about expansive jurisdiction. First, nations are sovereign and each nation has the right to structure its own economy. Second, people, firms and citizens of a nation have a right to notice of the law that governs their actions. When a foreign actor has merely performed a customary act in his own nation with no notice of a wrong, he cannot justly be hauled into another nation's courts and thereby trigger broad discovery and the spector of treble damages which in themselves are considered gargantuan in his home nation. Third, a world in which every nation's law governed every transaction of every individual acting at home and with respect to its internal market would be unlivable as well as grossly inefficient.[18]

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18. For an example of the inefficiency of imposing United States antitrust law on conduct more properly the subject of foreign regulation, *see British Nylon Spinners, Ltd. v. Imperial Chem. Indus., Ltd.* (II) [1955] Ch. 37 (ordering British patent assignee to perform contract (continued...)

In this context, Judge Cardozo's admonition in *Palsgraf* comes to mind: "The risk reasonably to be perceived defines the duty to be obeyed." *Palsgraf v. Long Island Railroad Co.*, 248 N.Y. 339, 334, 162 N.E. 99, 100 (1928) (no duty of care, and hence no negligence, to plaintiff whose injury was not foreseeable). Conduct should be regulated only by laws that are understandable. A firm cannot act in accordance with the law unless the consequences of its conduct and the potential legal exposure for such consequences are definable in advance within predictable limits.

Accordingly, there comes a point at which principled lines must be drawn. The European Community has recognized this reality of the global economy in the recent *Wood Pulp* case. *See Re Wood Pulp Cartel: A Ahlstromoy v. E.C. Commission*, 1988 E.C.R. S193, 4 C.M.L.R. 901 (1988) (case 89/85). The European Court of Justice dismissed the wood pulp cartel case against an American Webb-Pomerene Association, KEA, because, while KEA was allegedly a forum for and participant in a cartel directed at Europe, KEA did not *implement* its agreement in the Community.

K.F. Alder's argument for dismissal is similar to and much stronger than KEA's. It is similar because K.F. Alder implemented no offending conduct in or into the United States. It is much stronger because K.F. Alder's alleged "offense"—agreeing with joint underwriters as to the risks the joint venture would underwrite—cannot be regarded as a wrong to America for which

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18.(...continued)
notwithstanding United States decree requiring cancellation and reassignment of British patent); *see also United States v. Imperial Chem. Indus., Ltd.*, 105 F. Supp. 215 (S.D.N.Y. 1952) (cancelling British patent assignment contract because of violation of United States antitrust law); *British Nylon Spinners, Ltd. v. Imperial Chem. Indus., Ltd.*, [1953] Ch. 19 (enjoining British assignee from reassigning patents to American assignor).

notice can be charged. Unlike a cartel or coercive boycott, K.F. Alder's conduct is not within the purview of consensus offenses under the law of nations. *See* American Bar Association, Section of Antitrust Law, *Report of the Special Committee on International Antitrust*, Chs. 1, 2 (Sept. 1, 1991) (cartels are consensus offenses; allowance of export cartels reflects a parochial beggar-thy-neighbor policy). To the contrary, K.F. Alder's conduct was normal and natural business conduct. Great Britain invited the conduct and the collaboration was necessary for the very workings of the Lloyd's reinsurance market.

When we examine K.F. Alder's case against the two competing prongs of extraterritoriality, we find that, first, the interest of the United States in extended jurisdiction—by telling a reinsurer what risks it must cover—is nonexistent. Second, the interests of K.F. Alder in fairness and notice, and the interests of Great Britain in the efficiency and solvency of the Lloyd's firms are overwhelming.

This case suggests a principle: a regulating nation (the United States) has no subject matter jurisdiction over a foreign defendant who acts on its own soil with its own nationals in pursuance of conduct regarded as a lawful, good and necessary business activity in its own country, where there is no conduct in or into the regulating nation, and which conduct has no characteristics of a "wrong" to the ultimate plaintiff.

The wisdom of this conclusion is all the more compelling when we examine more fully the special predicament of K.F. Alder. The only specific conduct allegation against K.F. Alder is that K.F. Alder attended a single meeting at which it allegedly agreed to exclude all pollution coverage from its reinsurance treaties. JA-32 (Cal. Compl. ¶¶ 94-95); JA-84-85 (Conn. Compl. ¶¶ 98-99). This decision was a reaction to (1) judicial expansion by United States courts of coverage under existing CGL policies to shift the astronomical cost of cleaning up decades of environmental contamination from corporate polluters to insurers, notwithstanding

express policy terms intended to exclude such coverage;[19] and (2) the skyrocketing expense reinsurers were incurring as a result of such exposure, which expense had the potential to threaten the very financial stability of some individual underwriters at Lloyd's. *Cf. New Castle County v. Hartford Accid. & Indem. Co.*, 933 F.2d 1162, 1202 (3d Cir. 1991) (acknowledging "sound economic

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19. *See, e.g., Shapiro v. Public Serv. Mut. Ins. Co.*, 19 Mass. App. 684, 477 N.E.2d 146 (1985) (refusing to enforce pollution exclusion according to its terms); *Summit Assoc. v. Liberty Mut. Ins. Co.*, 229 N.J. Super. 56, 550 A.2d 1235 (App. Div. 1988) (reversing lower court opinion which held that public policy considerations override plain meaning of owned property exclusion in CGL policies); *Jackson Township Mun. Util. Auth. v. Hartford Accid. & Indem. Co.*, 186 N.J. Super. 156, 451 A.2d 990 (Law Div. 1982) (gradual, long term pollution deemed "sudden and accidental," and thus covered, as long as it was unexpected and unintended by the insured); *Niagara County v. Utica Mut. Ins. Co.*, 80 A.D.2d 415, 439 N.Y.S.2d 538 (4th Dep't 1981) (pollution exclusion will be applied only to "active" polluters notwithstanding the absence of such limitation from the terms of the exclusion); *Allstate Ins. Co. v. Klock Oil Co.*, 73 A.D.2d 486, 426 N.Y.S.2d 603 (4th Dep't 1980) (the word "sudden" as used in the pollution exclusion will not be limited to an instantaneous happening); *Waste Management of Carolinas Inc. v. Peerless Ins. Co.*, 323 S.E.2d 726, (N.C. Ct. App. 1984) (treating pollution exclusion as restatement of occurrence definition), *rev'd*, 315 N.C. 688, 340 S.E.2d 374 (1986); *United Pub. Ins. Co. v. Van's Westlake Union, Inc.*, 34 Wash. App. 708, 664 P.2d 1262 (1983) (pollution exclusion not applied and instead construed as simply a restatement of occurrence definition in CGL policy); *see also Centennial Ins. Co. v. Lumbermen's Mut. Casualty Co.*, 677 F. Supp. 342, 346 (E.D. Pa. 1987) (each of 16 deposits of pollutants is a separate "occurrence" allowing insured to collect additional, separate sets of policy limits); *Pacific Indem. Co. v. Bunker Hill Co.*, Civ. No. 79-2010, 1984 WL 3256 (D. Idaho July 3, 1984) (triple "trigger" applied to pollution claims finding coverage under every policy from initial dumping of pollutants through manifestation of contamination).

reasons" why the insurance industry might choose to insure some pollution losses and not others). The District Court found that there were legitimate business reasons for the underwriters at Lloyd's to agree to the terms on which they would jointly underwrite risks. A-76-77.

As plaintiffs concede, treaty reinsurance is paradigmatic of a product that is not available and cannot be made available absent collaboration among the participating underwriters. JA-11, 17 (Cal. Compl. ¶¶ 4(u), 28, 31); JA-61 (Conn. Compl. ¶ 4(g)). Agreements as to the terms of shared risks are legal, indeed contemplated, under British law. A-73; JA-263 (Restrictive Trades Practices (Services) Order 1976, S.I. 1976 No. 98, Schedule ¶ 8); § 2 Competition Act of 1980, vol. 47 Trade & Industry (PT 1).

Plaintiffs' core complaint, namely the terms upon which CGL insurance is available, can be addressed without an unwarranted application of United States law to K.F. Alder. Plaintiffs have challenged the modification of ISO forms and the withdrawal of statistical support for broader ISO CGL forms. *See generally* JA-23-33 (Cal. Compl. ¶¶ 97-100); JA-85-86 (Conn. Compl. ¶¶ 101-04). Plaintiffs have also alleged that certain defendants coerced ISO into accepting more restrictive policy forms. JA 26-29 (Cal. Compl. ¶¶ 74-83); JA-79-81 (Conn. Compl. ¶¶ 78-86). Each of these claims is independent from the London reinsurance claims. There is no justification for allowing plaintiffs to pursue K.F. Alder and other reinsurers who, without any intent to harm or effect United States commerce, simply conducted their business affairs within the bounds of British law.

If there were subject matter jurisdiction in this case, other characteristics relating to K.F. Alder, such as K.F. Alder's lack of a United States parent or affiliate and the fact that K.F. Alder's presence adds virtually nothing to plaintiffs' case, would be weighty in a comity analysis. But this Court need not even reach a comity analysis. As the European Community has recognized, some line

must be drawn to legitimize the exercise of extraterritorial jurisdiction when exercise is necessary to protect the important interests of a regulating nation. Application of an appropriate principle requires recognition that K.F. Alder is beyond the subject matter jurisdiction of the United States courts.

II.

INTERNATIONAL COMITY CONSTRAINS THE EXTRATERRITORIAL APPLICATION OF THE ANTITRUST LAWS OF THE UNITED STATES

A. Comity Limits The Exercise Of Jurisdiction Over Antitrust Claims Against Foreign Subjects and Conduct

Comity implies mutual respect, mutual deference and restraint and even mutual help. *See, e.g., Hilton v. Guyot*, 159 U.S. 113 (1985); *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976), *aff'd after remand*, 749 F.2d 1378 (9th Cir. 1984), *cert. denied*, 472 U.S. 1032 (1985); Agreement Between the Government of the United States and the Commission of the European Communities Regarding the Application of Their Competition Laws, Sept. 23, 1991, 30 I.L.M. 1487, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,504 (1992) (positive comity among nations in helping one another enforce their respective laws). Comity is thus a doctrine of reciprocity. Negative comity implies that, under certain circumstances, one sovereign state will not regulate the conduct of the nationals of a second sovereign state and that the second sovereign state will similarly respect the freedom of actions of nationals of the first.

Our world economy is becoming ever more interdependent. Increasingly, conduct in one nation transcends national boundaries. It has become important, therefore, to define those categories of

conduct by foreign firms that deserve mutual respect and restraint and those categories that do not.

At the extremes, an international consensus is emerging. The United States and its trading partners are moving to a consensus that sharp-shooting cartels and boycotts directed from one nation across the borders of another and implemented in that other nation are presumptively not worthy of the victim nation's respect and restraint. The national and world interest in competition normally trumps a second nation's interest in allowing its firms to wield market power and profit from exploiting citizens of another country. *See* American Bar Association, Section of Antitrust Law, *Report of the Special Committee on International Antitrust*, Ch. 1-3 (Sept. 1, 1991).

But at the other extreme a nation has an interest in being let alone to run an entirely internal market such as the Lloyd's reinsurance market. At this extreme, comity considerations are overpowering. The United States would not abide intrusion by foreign courts to reset the terms of its own internal markets. In return for control over its own markets and in the interest of reciprocity (if not in the interest of long-term world competition) the United States must accept the obligation to leave the Lloyd's reinsurance market alone.

K.F. Alder's conduct goes to the core of the functioning of the Lloyd's reinsurance market. That market could not exist without agreements among joint venturers as to the risks they will jointly underwrite. Comity therefore requires the dismissal of the claims against K.F. Alder.

B. *Timberlane* And Other Decisions Set Forth A Useful Framework For Analyzing When International Comity Counsels Against Extraterritorial Application Of United States Antitrust Law

Mindful of the political and economic implications of applying United States antitrust law to foreign subjects and conduct abroad, federal courts and scholars have identified several factors that may be considered in deciding whether to exercise jurisdiction. *See, e.g., Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1292 (3d Cir. 1979) (exercising jurisdiction "when two American litigants are contesting alleged antitrust activity abroad that results in harm to the export business of one"); *Timberlane*, 549 F.2d 597 (9th Cir. 1976), *aff'd after remand*, 749 F.2d 1378 (9th Cir. 1984), *cert. denied*, 472 U.S. 1032 (1985) (affirming refusal to exercise antitrust jurisdiction on comity grounds); *see also* Restatement (Third) Foreign Relations Law § 403 (1987) (setting forth factors important to comity analysis).[20] Of these, *Timberlane* is considered the leading statement of "whether American authority *should* be asserted in a given case as a matter of international authority." *Timberlane*, 549 F.2d at 613 (emphasis in original).[21] The

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20. The Court of Appeals for the District of Columbia has rejected comity and interest balancing as an essentially futile and result-driven process. *See Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984).

21. *Timberlane* contemplated a three step analysis to evaluate whether jurisdiction should be exercised over foreign defendants engaged in clearly abusive conduct: (1) there must be an actual or intended effect on America commerce; (2) there must be a cognizable civil violation of American antitrust law; and (3) the interests of and links to the United States must be sufficiently strong vis-á-vis other nations to justify an assertion of extraterritorial authority. 549 F.2d at 613. As to the third prong, *Timberlane* requires considerations of the following (continued...)

formulations vary in their details, but each attempts to give due weight to the competing interests of sovereign governments in an international dispute. *See Mannington Mills*, 595 F.2d at 1297-98; *Timberlane*, 549 F.2d at 614; United States Dept. of Justice Antitrust Guidelines for International Operations, Antitrust of Trade Reg. (BNA) Special Supp. to No. 1391, § 5, at 5-22 (Nov. 17, 1988); Restatement (Third) Foreign Relations Law § 403.

When the United States has a stake in enforcement because foreigners' conduct has harmed its important interests, the United States should be able to enforce its law at least against foreign firms that are intentionally and seriously harming United States interests unless application of United States law would be unreasonable. When the United States' stake is not so clear, the interest of foreign nations and fairness to foreign defendants could more readily tip the balance toward abstention. If the enforcing nation's stake is very

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21.(...continued)
factors:

1. the degree of conflict with foreign law or policy;
2. the nationality, location and principal places of business of the parties;
3. the extent to which enforcement by either state can achieve compliance;
4. the relative significance of effects on the United States as compared to elsewhere;
5. the existence of intent to harm or affect United States commerce;
6. the foreseeability of such effect; and
7. the relative importance to the violations charged of the conduct within the United States as compared with conduct abroad.

549 F. 2d at 614. This list is not exhaustive of all considerations potentially relevant to the comity analysis.

clear, a higher degree of foreign conflict would be necessary to warrant a decline of jurisdiction.

As to K.F. Alder, United States interests in assertion of jurisdiction is slight. The unfairness to K.F. Alder, should the District Court exercise jurisdiction, is clear and the extreme intrusiveness of United States relief against ordinary internal market transactions is also clear.

Because K.F. Alder is a foreign subject peripheral to, and many layers removed from, the primary alleged evil and its conduct was clearly not abusive, comity requires examination of the relationship of the defendant to the core allegations and consideration of whether dismissal of the defendant impairs or has little effect on important interests that United States law protects. *Cf. Associated Gen. Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983) (among factors relevant to whether plaintiff is entitled to relief under antitrust law are directness or indirectness of alleged injury and whether more direct victims of challenged conduct exist).

1. The Foreign Trade Antitrust Improvements Act Of 1982 Does Not Limit A District Court's Discretion To Abstain From Exercising Jurisdiction On Comity Grounds

The Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA") addressed the jurisdictional reach of federal antitrust law. It was intended to limit the application of United States law to United States companies doing business abroad. The statute eliminates federal subject matter jurisdiction regarding commerce other than import commerce unless the challenged conduct has a "direct, substantial and reasonably foreseeable effect" on domestic commerce or exports from the United States. 15 U.S.C. § 6a (Supp. 1992). *See, e.g., The 'In' Porters, S.A. v. Hanes Printables, Inc.*, 663 F. Supp. 494, 499-501 (M.D.N.C. 1987) (plaintiff's injuries wholly within France did not satisfy requirement of actual injury to plaintiff

within the United States); *Liamuiga Tours v. Travel Impressions Ltd.*, 617 F. Supp. 920, 924-25 (E.D.N.Y. 1985) (St. Kitts situs of alleged effects did not support jurisdiction); *Eurim-Pharm GmbH v. Pfizer, Inc.*, 593 F. Supp. 1102, 1106-07 (S.D.N.Y. 1984) (failure to allege causal link between conduct in Europe and alleged price increase in the United States fatal to jurisdiction).

While it clarified certain limits to the extraterritorial reach of United States antitrust law, Congress stated that it intended "neither to prevent nor to encourage additional judicial recognition of the special international character of transactions." H.R. Rep. No. 97-686, 97th Cong., 2d Sess. 2, 13, *reprinted in* 1982 U.S.C.C.A.N. 2487, 2498. The FTAIA in no way affected a court's ability, indeed duty, to consider international comity in deciding whether to refrain from exercising extraterritorial jurisdiction. The House Report that accompanied the bill states, "If a court determines that the requirements for subject matter jurisdiction are met, this bill would have no effect on the courts' ability to employ notions of comity, *see, e.g., Timberlane Lumber Co. v. Bank of America*, 549 F.2d 1287 (3d Cir. 1979) [sic], or otherwise to take account of the international character of the transaction." H. R. Rep. No. 97-686, 97th Cong. 2d Sess. at 13, *reprinted in* 1982 U.S.C.C.A.N. at 2498.

The Ninth Circuit misinterpreted the FTAIA when it held that "[w]e do not believe a *Timberlane* analysis . . . can be unaffected by the statute. . . . [If the FTAIA is not a bar] it is only in an unusual case that comity will require abstention from jurisdiction." A-28. By directing courts to be self-consciously ungenerous in their comity analysis and construing the FTAIA to expand extraterritorial application of United States antitrust law, the Court of Appeals turned the FTAIA on its head.

2. The District Court's Exercise Of Restraint Was Proper And Should Be Upheld

The Circuits are split as to whether a decision to abstain from exercising jurisdiction over an extraterritorial application of United States antitrust law is to be resolved as a matter of law or is properly left to the discretion of the district court.[22] *See In re Uranium Antitrust Litigation*, 617 F.2d 1248, 1255 (7th Cir. 1980); *Timberlane*, 595 F.2d 1297-98. *But see Industrial Inv. Dev. Corp. v. Mitsui & Co.*, 671 F.2d 876, 884 (5th Cir. 1982), *cert. granted and judgment vacated*, 460 U.S. 1007 (1983).

We submit that the District Court should have a range of discretion to decline to exercise jurisdiction. The question should be discretionary when the District Court has considered all relevant

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22. There is some confusion generally in the lower federal courts over the standard of review applicable to decisions to decline or to exercise jurisdiction in light of comity considerations, whether those decisions involve recognition of a foreign judgments, first to file rules or concurrent jurisdiction. *See Overseas Inns S.A. P.A. v. United States*, 911 F.2d 1146, 1148-49 n.4 (5th Cir. 1990); *West Gulf Maritime Ass'n v. ILA Deep Sea Local 24*, 751 F.2d 721, 729 n. 2 (5th Cir. 1985); *see also Société Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa*, 482 U.S. 522, 554 (1987) (Blackmun, J., concurring and dissenting) (disagreeing with majority's view that comity requires case-by-case analysis); *cf. Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1229-30 (9th Cir. 1989) (affirming district court's discretion to dismiss case in deference to tribal proceedings); *Remington Rand Corp. v. Business Sys., Inc.*, 830 F.2d 1260, 1266 (3d Cir. 1987) (district court's decision not to extend comity to decision of foreign tribunal affirmed under abuse of discretion standard); *Pacesetter Sys., Inc. v. Medtronic, Inc.*, 678 F.2d 93, 95-96 (9th Cir. 1982) (dismissal in favor of earlier filed action involving same issue between same parties in another federal court was not an abuse of discretion).

factors and has not made a perceptible error in assessing the proportionate weight of the factors. The District Court acted within these parameters by dismissing the London reinsurance claims. The dismissal should have been affirmed by the Ninth Circuit unless the appellate court found that the District Court had abused its discretion.

The House Report that accompanied the FTAIA implicitly recognizes the discretionary character of comity considerations by referring to a court's "ability" to take such interests into account. H.R. Rep. No. 97-686, 97th Cong., 2d Sess. at 13, *reprinted in* 1982 U.S.C.C.A.N. at 2498. The comity analysis, requiring as it does a balancing of competing interests, "does not counsel a rigid and mechanical solution of such problems. The factors relevant to wise administration here are equitable in nature. Necessarily, an ample degree of discretion, appropriate for disciplined and experienced judges, must be left to the lower courts." *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183-84 (1952). Given its greater familiarity with the facts, the claims and the litigants, the District Court is in the best position to screen weak claims against foreign defendants.

When a district court dismisses antitrust claims against a peripheral foreign defendant that exercise of restraint should be upheld in view of the United States interest in containing excessive, oppressive and internationally troublesome litigation. *Cf. Celotex Corp. v. Catrett*, 477 U.S. 317, 324-25 (1986) (principal purpose of summary judgment rules is to dispose of meritless claims).

III.

UNDER *TIMBERLANE* THE DISTRICT COURT PROPERLY DECLINED TO EXERCISE JURISDICTION OVER THE CLAIMS AGAINST K.F. ALDER

In reversing the dismissal on comity grounds, the Ninth Circuit failed to consider the special case of K.F. Alder and others similarly situated. The District Court properly dismissed the claims against K.F. Alder.

K.F. Alder is an unincorporated association of individuals with its principal place of business at Lloyd's in London, England. JA-11, 13 (Cal. Compl. ¶¶ 4(t), 12); JA-61, 68 (Conn. Compl. ¶¶ 4(h), 25). With respect to the type of coverage relevant to this case, K.F. Alder is a British reinsurer providing insurance to Lloyd's reinsurers. Its business is regulated by Great Britain and it acted according to British practice and custom. K.F. Alder is not alleged to have written CGL insurance for United States pollution risks. K.F. Alder is not affiliated with any United States company. K.F. Alder committed no acts in the United States in furtherance of any conspiracy. All that K.F. Alder is alleged to have done is a legitimate and necessary business act under the laws of its principal place of business: attending a meeting at which co-venturers allegedly agreed to the risks they would underwrite.

Reviewing the claims against K.F. Alder within the comity framework, the Court of Appeals should have affirmed their dismissal.

A. Degree Of Conflict With Foreign Law Or Policy

The District Court found, and the Court of Appeals agreed, that extraterritorial application of United States antitrust law to these claims would offend British law and policy in two respects: First, the London reinsurance insurance business is conducted within "a regulatory and competitive framework established by the British

government." (A-72. *See also* A-29). Second, "the evidence of conflict between the antitrust laws and English law and policy is substantial." A-74. *See also* A-29. The United Kingdom's position before this Court confirms this conclusion. *See* Brief of the Government of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Petitioners, dated February 12, 1992, at 9.

Any attempt to impose United States antitrust law on the Lloyd's reinsurance marketplace in a way that impairs normal business transactions would conflict with the "regulatory and competitive framework established by the British government" within which Lloyd's operates. A-72. Further, British law permits precisely the type of agreements among reinsurers and retrocessional reinsurers that plaintiffs would invalidate. *See* A-73; JA-263 (Restrictive Trade Practices (Services) Order 1976, S.I. 1976 No. 98, Schedule ¶ 8); § 2 Competition Act of 1980, vol. 47 Trade & Industry (PT 1). Moreover, Great Britain has legislatively sought to obstruct any application of United States antitrust law to subjects or conduct within its borders. A-74. *See* A.V. Lowe, *Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act*, 75 A.J.I.L. 257 (1981). To that effect, the British Parliament enacted the Protection of Trading Interests Act, effective March 20, 1980. *See id.*; Comment, *Antitrust: British Restrictions on Enforcement of Foreign Judgments*, 21 Harv. Int'l L.J. 727 (1980). Under the Act, the British Secretary of State can "block" the enforcement of foreign court judgments that prejudice British interests. *See also Société Nationale*, 482 U.S. at 527 (French blocking statute enacted to impede enforcement of United States antitrust law).

Both courts below held that in the absence of countervailing factors, these conflicts alone justify abstention.

B. The Nationality Or Allegiance Of The Parties And The Locations Of The Principal Places Of Business Of Corporations

K.F. Alder is an unincorporated association of individuals with its principal place of business at Lloyd's in London, England. JA-11, 13 (Cal. Compl. ¶¶ 4(t), 12); JA-61, 68 (Conn. Compl. ¶¶ 4 (h), 25). It is a wholly British entity. It is not a subsidiary of any United States corporation. Nor is it otherwise affiliated with any United States corporation. While the District Court correctly noted that "many of the corporate defendants are subsidiaries of American parents," A-75, this is not the case as to K.F. Alder and the District Court did not find to the contrary.

Whether or not the Court of Appeals correctly observed that "[t]he interests of Britain are at least diminished where the parties are subsidiaries of American corporations," A-29, this observation does nothing to justify the exercise of jurisdiction over K.F. Alder.[23]

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23. The Court stated:

> The defendants named in certain counts are English or located in England. The district court found that "many of the corporate defendants," including those located in England, "are subsidiaries of American corporations and may be influenced by the allegiance of their American parents." . . . Moreover, although some counts of the complaints have named only the English reinsurers as defendants, other counts charge them as co-conspirators with American insurers. . . . It would not make much sense to dismiss the London defendants on some counts and hold them answerable on others. On balance, the presence of the American plaintiffs, many American defendants and some American subsidiaries is a factor pointing towards the exercise of jurisdiction.

(continued...)

In reversing the dismissal of the claims against K.F. Alder and others, the Court of Appeals relied on the fact that *some* of the London defendants are alleged to have co-conspired with American insurers. The Ninth Circuit believed "[i]t would not make much sense to dismiss the London defendants on some counts and hold them answerable on others." A-29-30. This reasoning does not apply to K.F. Alder. If the London reinsurance claims against K.F. Alder are dismissed, K.F. Alder is out of the case.[24]

The District Court found that adjudication of this dispute would require the testimony of witnesses and the production of documents located in England. A-75. On balance, the court ruled that nationality or allegiance of the parties and their principal places of business weighed against an exercise of jurisdiction. A-75. As to K.F. Alder, this factor weighs heavier still.

C. The Extent To Which Plaintiffs Can Expect To Get Meaningful Relief Against K.F. Alder

Plaintiffs seek an injunction barring K.F. Alder from making any public announcements regarding product restrictions, pricing behavior or loss reserve charges. JA-52 (Cal. Compl. ¶ 167). Plaintiffs further seek an order requiring K.F. Alder to withdraw any terms or conditions of coverage established in the ordinary course of business. JA-54 (Cal. Compl. ¶ 174). Indeed, no court could compel K.F. Alder to provide pollution reinsurance because United States antitrust law does not impose a duty to deal absent a showing

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23.(...continued)
A-29-30.

24. If no federal claims against K.F. Alder survive a motion to dismiss, at this point in the proceeding the district court could not exercise pendent jurisdiction over the state law claims against K.F. Alder. *See United Mine Workers of America v. Gibbs*, 388 U.S. 715 (1966).

of market power. *See Northwest Wholesale Stationers, Inc. v. Pacific Stationery Printing Co.*, 472 U.S. 284 (1985); *United States v. Colgate & Co.*, 250 U.S. 300 (1919).

But, as the District Court observed, even if an injunction were entered against K.F. Alder, it is "improbable" that a British court would enforce the requested injunction against activities in London. A-76. The injunction against K.F. Alder would be neither enforceable nor enforced. *See* British Protection of Trading Interests Act (1980). The District Court concluded that this factor tipped against the exercise of jurisdiction. A-76-77.

The Court of Appeals, in contrast, emphasized that compliance could be achieved as to the defendants with American affiliations. A-30. However, as previously noted, K.F. Alder is a British defendant *without* American affiliations and the Ninth Circuit's observation is wholly inapplicable.

The Court of Appeals believed that enforcement of an injunction against American companies and British companies affiliated with American companies would result in "substantial compliance." *Id.* This observation supports the dismissal of the claims against K.F. Alder. The relative importance to plaintiffs' claims of having K.F. Alder before the District Court is minimal, if not non-existent.

D. The Relative Significance Of The Effects On The United States As Compared With Those Elsewhere

The District Court concluded, and the Court of Appeals agreed, that the challenged conduct affected commerce in the United States. A-30, 76. Again, it spoke of conduct in the aggregate including claims that some defendants coercively refused to deal with Americans to get better terms. Given the nature of how coverage is underwritten in the Lloyd's reinsurance market, K.F. Alder surely could not have provided reinsurance for primary insurers of American risks alone.

The District Court found that there were legitimate business reasons for the joint decision to exclude certain coverage. A-76-77. The legitimate business justification driving the agreement was that it was uneconomical to cover pollution risks. United States antitrust law cannot compel joint venturers to provide what business solvency counsels them not to provide. With or without an agreement, the uneconomic coverage would not have been provided.[25] A decision of British service providers not to extend the terms of their coverage does not "cause an effect" in the United States; surely it does not do so in the sense that a coercive boycott or price cartel causes an effect. *Cf. Montreal Trading Ltd. v. Amax Inc.*, 661 F.2d 864 (10th Cir. 1981) (party alleging inability to purchase as result of antitrust law violation lacks standing if alleged injury is tenuous or fact of injury is speculative), *cert. denied*, 455 U.S. 1001 (1982); *National Bank of Canada v. Interbank Card Ass'n*, 666 F.2d 6 (2d Cir. 1981) (extraterritorial jurisdiction under Sherman Act requires injury to United States commerce which reflects anticompetitive effects of violation outside of United States). Accordingly, K.F. Alder's alleged conduct did not affect United States commerce in a manner that tips the balance in favor of the exercise of jurisdiction.

E. The Extent To Which There Is An Explicit Purpose To Harm Or Affect United States Commerce

The District Court found that the challenged conduct "was directed primarily at reducing [defendants'] exposure to certain risks and controlling losses, a legitimate business purpose." A-76. The District Court believed this factor weighed against the exercise of

25. In this context, the tort law concepts of nonfeasance and malfeasance are applicable. K.F. Alder and its co-defendants are alleged to have done nothing more than decline to confer a benefit that they cannot in any event be compelled to provide. But if there is no duty owed, one cannot be instructed as to how the duty must be performed.

jurisdiction. It clearly does. Indeed, this finding itself makes intrusion by United States law inappropriate and unreasonable.

The District Court's finding also bears on whether there is a cognizable civil violation of United States antitrust law. *See Timberlane*, 549 F.2d at 613. Under a rule of reason analysis, the legitimate business justification for K.F. Alder's actions undermines any basis for liability.[26] The weakness of the underlying claims against K.F. Alder further supports jurisdictional restraint.

F. Foreseeability Of Such Effect

The District Court found that the effect on commerce in the United States was foreseeable. A-77. Again, this factor was determined in the aggregate. However, K.F. Alder could not foresee that sending a representative to a risk discussion meeting in London would have an effect on United States commerce sufficient to form a predicate for a claim under United States antitrust law. The legitimacy of its acts in the Lloyd's reinsurance marketplace is particularly compelling as to K.F. Alder, for it acted solely in the Lloyd's reinsurance marketplace and it had every legitimate expectation that only the law of Great Britain would apply to its conduct. Because "[t]he risk reasonably to be perceived defines the duty to be obeyed," *Palsgraf v. Long Island Railroad Co.*, 248 N.Y. 339, 344, 162 N.E. 99 (1928), exposure under United States antitrust law was not a foreseeable consequence of K.F. Alder's natural, normal and customary business act.

26. *Timberlane* requires the District Court to make a rough evaluation of the merits of the underlying claim when considering whether there is a cognizable antitrust claim. 549 F.2d at 613.

G. The Relative Importance To The Violation Charged Of Conduct Within The United States As Compared With Conduct Abroad

The District Court ruled that, on balance, this factor was neutral in light of the interplay between the alleged activities in the United States and the alleged foreign agreements. A-77. But K.F. Alder engaged in *no* relevant conduct in the United States. The claims against K.F. Alder are based entirely on conduct outside of the United States. As to K.F. Alder, this factor properly weighs heavily against the exercise of jurisdiction. The Court of Appeals did not address this issue.

* * *

After thoughtfully analyzing the London reinsurance claims in light of comity considerations, the District Court exercised appropriate restraint and dismissed the claims. On appeal, the Ninth Circuit was obliged to consider whether the exercise of jurisdiction was appropriate as to each individual defendant. This Court may do so, and upon doing so should, we submit, conclude that the factors require dismissal of K.F. Alder.

While many extraterritorial problems will present difficult questions, K.F. Alder's case does not. K.F. Alder's alleged conduct is clearly beyond the permissible jurisdictional reach of a United States court.

CONCLUSION

For all the foregoing reasons, petitioner K.F. Alder respectfully requests that as to K.F. Alder the judgment of the Court of Appeals for the Ninth Circuit on the London reinsurance claims be reversed and the judgment of the District Court for the Northern District of California be reinstated.

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November 19, 1992

Respectfully submitted,

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